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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 JOE J.W. ROBERTS, JR.,

10 Plaintiff,

11 v.

12 VILMA KHOUNPHIXAY, *et al.*,

13 Defendants.

Case No. C19-014-TSZ-MLP

ORDER RE: PLAINTIFF'S PENDING  
MOTIONS

14  
15 **I. INTRODUCTION**

16 Plaintiff Joe Roberts is a state prisoner who is proceeding with this civil rights action *pro*  
17 *se* and *in forma pauperis*. This matter comes before the Court at the present time on Plaintiff's  
18 motions for leave to amend his complaint (dkt. # 65), for a stay of summary judgment and  
19 continuance of discovery (dkt. # 66), for an extension of time to file a response to Defendants'  
20 summary judgment motion and leave to file an over-length brief (dkt. # 62), and for a mistrial  
21 (dkt. # 63). Defendants have filed responses to each of Plaintiff's motions. Defendants take no  
22 position on Plaintiff's request for an extension of time to file his response to their summary  
23 judgment motion or his request to file an over-length brief. (Dkt. # 71.) Defendants do, however,

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1 oppose Plaintiff's motions for leave to amend, for a stay of summary judgment and continuance  
2 of discovery, and for a mistrial. (Dkt. ## 72, 73, 74.) The Court addresses each of Plaintiff's  
3 motions below.

## 4 **II. DISCUSSION**

### 5 **A. Motion for Leave to Amend**

6 Plaintiff seeks leave to amend his complaint to add new claims and new Defendants to  
7 this action. (Dkt. # 65.) Plaintiff's current motion to amend was filed less than a month after a  
8 similar attempt by Plaintiff to amend his complaint was denied. (*See id.* and Dkt. # 45.) Plaintiff  
9 indicates in his motion that he wishes to add to this action claims under the Americans with  
10 Disabilities Act ("ADA") and the Rehabilitation Act ("RA"), and claims alleging failure to  
11 protect, failure to provide medical care, and deprivation of personal hygiene and sanitation. (*See*  
12 Dkt. # 65 at 1.) Plaintiff also indicates a desire to add the following Defendants to this action: the  
13 Washington Department of Corrections ("DOC"); Lisa Anderson, Associate Superintendent at  
14 the Monroe Correctional Complex ("MCC"); Tim Thrasher, DOC Housing Administrator; and,  
15 John Does 1-19. (*See id.*) Defendants argue that Plaintiff's current motion to amend should be  
16 denied because it mirrors his prior motion which was denied. (*See* Dkt. # 74.)

#### 17 *1. Applicable Standard*

18 Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that the court should  
19 freely give leave to amend "when justice so requires." Five factors are typically considered when  
20 assessing the propriety of a motion for leave to amend: (1) bad faith; (2) undue delay; (3)  
21 prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has  
22 previously amended his complaint. *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).  
23 The dispositive issue here is the futility of Plaintiff's proposed amendments. An amendment to a

1 complaint is futile when “no set of facts can be proved under the amendment to the pleadings  
2 that would constitute a valid and sufficient claim or defense.” *Missouri ex. Rel. Koster v. Harris*,  
3 847 F.3d 646, 656 (9th Cir. 2017) (citing *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th  
4 Cir. 1988), *overruled on other grounds by Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

5                   2.       *Proposed New Claims*

6           Plaintiff seeks to add to this action claims under the ADA, 42 U.S.C. § 12132, and the  
7 RA, 29 U.S.C. § 794. Title II of the ADA provides in pertinent part that “no qualified individual  
8 with a disability shall, by reason of such disability, be excluded from participation in or be  
9 denied the benefits of the services, programs, or activities of a public entity, or be subjected to  
10 discrimination by any such entity.” 42 U.S.C. § 12132. The RA provides in pertinent part that  
11 “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his  
12 disability, be excluded from the participation in, be denied the benefits of, or be subjected to  
13 discrimination under any program or activity receiving Federal financial assistance . . . .” 29  
14 U.S.C. § 794.

15           In order to establish a violation of Title II of the ADA, a plaintiff must show that (1) he is  
16 a qualified individual with a disability; (2) he was excluded from participation in or otherwise  
17 discriminated against with respect to a public entity’s provision of a service, program, or activity;  
18 and, (3) such exclusion or discrimination was by reason of his disability. *See, e.g., Lovell v.*  
19 *Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). In order to establish a violation of the RA, a  
20 plaintiff must show that (1) he is handicapped within the meaning of the RA; (2) he is otherwise  
21 qualified for the benefit or services sought; (3) he was denied the benefit or services solely by  
22 reason of his handicap; and (4) the program providing the benefit or services receives federal  
23 financial assistance. *See id.*

1 The primary claim asserted in this action is that Defendants violated Plaintiff's rights  
2 under the Eighth Amendment when they were deliberately indifferent to his medical and mental  
3 health needs in relation to his reports that he was suicidal. The treatment or lack of treatment for  
4 Plaintiff's medical and mental health issues does not provide a basis upon which to impose  
5 liability under the ADA and the RA. The Ninth Circuit has made clear that the ADA and the RA  
6 prohibit discrimination because of a disability, not because of inadequate treatment for a  
7 disability. *See Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1022 (9th Cir. 2010), *overruled*  
8 *on other grounds by Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc);  
9 *O'Guinn v. Nevada Dept. of Corrections*, 468 Fed. Appx. 651, 653 (9th Cir. 2012). Plaintiff's  
10 proposed ADA and RA claims are not viable in this action and it would therefore serve no  
11 purpose to allow Plaintiff to amend his complaint to add such claims.

12 Plaintiff also seeks to add to this action purportedly new claims arising under the Eighth  
13 Amendment. Specifically, Plaintiff indicates that he is seeking to add claims for failure to  
14 protect, failure to provide medical care, and deprivation of hygiene and sanitation. These claims  
15 are virtually indistinguishable from the Eighth Amendment claims asserted by Plaintiff in his  
16 original complaint. It would serve no purpose at this juncture to permit Plaintiff to amend his  
17 complaint to simply separate out in a more specific fashion the various components of his over-  
18 arching Eighth Amendment claim.

19 3. *Proposed New Defendants*

20 Plaintiff also seeks to amend his complaint to add a total of twenty-two new Defendants  
21 to this action, including nineteen John Doe Defendants, MCC Associate Superintendent Lisa  
22 Anderson, DOC Housing Administrator Tim Thrasher, and the DOC. As Plaintiff was previously  
23 advised, in order to sustain a civil rights action under § 1983, a plaintiff must show (1) that he

1 suffered a violation of rights protected by the Constitution or created by federal statute, and (2)  
2 that the violation was proximately caused by a person acting under color of state law. *See*  
3 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To satisfy the second prong, a plaintiff  
4 must allege facts showing how individually named defendants caused, or personally participated  
5 in causing, the harm alleged in the complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir.  
6 1981). A defendant cannot be held liable solely on the basis of supervisory responsibility or  
7 position. *Monell v. Department of Social Servs., of City of New York*, 436 U.S. 658, 691-694  
8 (1978). Rather, a plaintiff must allege that a defendant's own conduct violated the plaintiff's civil  
9 rights. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385-90 (1989).

10 With respect to the proposed new individual Defendants identified in Plaintiff's amended  
11 complaint, Plaintiff has not alleged sufficient facts to demonstrate that any of them personally  
12 participated in causing him harm of federal constitutional dimension. It would therefore be futile  
13 to permit Plaintiff to add those Defendants to this action. With respect to the DOC, the only  
14 claims asserted against this proposed Defendant are Plaintiff's ADA and RA claims. As the  
15 Court explained above, those claims are not viable in this action and it would therefore serve no  
16 purpose to add the DOC as a Defendant. For the foregoing reasons, Plaintiff's motion for leave  
17 to amend his complaint (dkt. # 65) is DENIED.

18 **B. Motion for Stay of Summary Judgment and Continuance of Discovery**

19 Plaintiff seeks an order staying summary judgment and continuing discovery because he  
20 claims he was unable to effectively conduct discovery and meet the August 26, 2019 discovery  
21 deadline. (Dkt. # 66.) According to Plaintiff, he was suffering from health problems which  
22 caused him to be in and out of the infirmary from March 1, 2019 to August 20, 2019 where he  
23

1 did not have access to his legal materials. (*Id.* at 1.) Plaintiff also claims that he was transferred  
2 multiple times which caused him to be separated from his legal materials. (Dkt. # 76.)

3 Defendants oppose Plaintiff's motion to stay summary judgment and continue discovery,  
4 arguing that Plaintiff has not identified any hardship or inequity he would suffer if required to  
5 respond to Defendants' summary judgment motion without conducting further discovery. (Dkt. #  
6 73.) Defendants maintain that Plaintiff's claim that he was unable to effectively conduct  
7 discovery between March and August 2019 because of health issues and lack of legal materials is  
8 not supported by the facts. (*Id.* at 2.) Defendants suggest as well that Plaintiff has had access to  
9 the records necessary to respond to their summary judgment motion and they assert that they will  
10 suffer possible damage to their professional reputations and medical practices if Plaintiff is able  
11 to forestall his multiple lawsuits. (*Id.* at 2-3.) Finally, Defendants argue that a lack of access to  
12 legal materials is not a basis for granting Plaintiff's motion. (*Id.* at 3.)

13 The record appears to confirm that Plaintiff has been transferred multiple times during  
14 the pendency of this action. It is to be expected that Plaintiff would have been separated from his  
15 legal materials for some period of time in the midst of these various transfers though it is  
16 somewhat difficult to discern exactly how long Plaintiff may actually have been without his legal  
17 materials because his claims in that regard vary somewhat. While the Court understands  
18 Defendants' objections to allowing Plaintiff to delay resolution of this matter, it appears that  
19 there were likely impediments to Plaintiff's ability to timely conduct discovery in this matter  
20 which were beyond his control. Thus, out of an abundance of caution, the Court will permit  
21 Plaintiff some additional time to conduct discovery, though any such discovery will be strictly  
22 limited to that necessary for Plaintiff to respond to Defendants' pending summary judgment  
23 motion.

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1 Accordingly, Plaintiff's motion for a stay of summary judgment and a continuance of  
2 discovery (dkt. # 66) is GRANTED. The discovery deadline is continued to **Friday, January 31,**  
3 **2020.** Defendants' motion for summary judgment (dkt. # 48) is RE-NOTED on the Court's  
4 calendar for consideration on **Friday, February 28, 2020.** Thus, Plaintiff's response to  
5 Defendants' summary judgment motion is due not later than **Monday, February 24, 2020.**  
6 Plaintiff is advised that this is the only continuance he will be granted so he should plan his  
7 litigation strategy carefully to allow him to meet these new deadlines.

8 **C. Motion for Extension of Time and Leave to File Over-Length Brief**

9 Plaintiff, by way of the instant motion, seeks a thirty-day extension of the deadline to file  
10 his response to Defendants' motion for summary judgment as well as leave to file a responsive  
11 brief in excess of twenty-four pages. Plaintiff's request for an extension of time to file a  
12 responsive brief is MOOT in light of the above ruling on Plaintiff's motion to stay summary  
13 judgment and continue discovery. To the extent Plaintiff seeks leave to file an over-length brief,  
14 his request is DENIED. Defendants' motion for summary judgment is only nineteen pages in  
15 length. The Court sees no reason why Plaintiff should not be able to present a reasonable  
16 response to that motion in the twenty-four pages permitted under court rules. *See* Local Civil  
17 Rule ("LCR") 7(e)(3). Plaintiff is reminded that the twenty-four page limitation applies only to  
18 his brief in opposition to Defendants' motion and not to any exhibits he may wish to submit in  
19 support of his brief.

20 **D. Motion for Mistrial**

21 Plaintiff asserts in his motion for mistrial that he has been treated unfairly in this case and  
22 he complains that he has "not had a fair opportunity to seek justice and bring my case." (Dkt. #  
23 63 at 1.) Plaintiff cites in particular to the Court's denials of his attempts to amend his complaint

1 and to DOC interference in his attempts to litigate this action. (*See id.* at 1-2.) Plaintiff asks to  
2 “restart the entire proceedings.” (*Id.* at 2.) Plaintiff’s request for a mistrial is misplaced because  
3 there has been no trial in this matter and, thus, there is no basis for granting the requested  
4 mistrial.

5 In addition to this very basic fact, the Court takes issue with Plaintiff’s characterization  
6 that he has been treated unfairly in these proceedings. It is true that Plaintiff’s attempts to amend  
7 his complaint have been rejected by the Court, but this is solely because Plaintiff’s proposed  
8 amended complaints have not adequately stated any viable new causes of action. While Plaintiff  
9 may feel this is unfair, it is the law. Plaintiff also complains that the DOC has interfered with his  
10 ability to litigate this action. While the record confirms that Plaintiff has been transferred  
11 between facilities a number of times during the pendency of this action, and while it is not  
12 unexpected that Plaintiff may not have access to his legal materials for periods of time as a result  
13 of such transfers, nothing in the record suggests that the DOC or, more specifically, the  
14 Defendants in this action, have done anything to actively or intentionally interfere with  
15 Plaintiff’s ability to litigate this action. Plaintiff’s motion for a mistrial (dkt. # 63) is frivolous  
16 and is therefore DENIED.

### 17 III. CONCLUSION

18 Based on the foregoing, Plaintiff’s motion for leave to amend his complaint (dkt. # 65) is  
19 DENIED, Plaintiff’s motion for a stay summary judgment and continuance of discovery (dkt. #  
20 66) is GRANTED in part, Defendants’ motion for summary judgment (dkt. # 48) is RE-NOTED  
21 for consideration on February 28, 2020, Plaintiff’s motion for an extension of time to respond to  
22 Defendants’ summary judgment motion and leave to file an over-length brief (dkt. # 62) is  
23 DENIED, and Plaintiff’s motion for a mistrial (dkt. # 63) is DENIED. The Clerk is directed to

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1 send copies of this Order to Plaintiff, to counsel for Defendants, and to the Honorable Thomas S.  
2 Zilly.

3 DATED this 18th day of November, 2019.

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6 MICHELLE L. PETERSON  
7 United States Magistrate Judge  
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